



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 07 2014

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Revised FIFRA Nationally Significant Issues Guidance

FROM: Rosemarie A. Kelley, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement

A handwritten signature in blue ink, reading "Rosemarie A. Kelley", is placed over the typed name and title of the sender.

TO: Regional Counsel
FIFRA Enforcement Managers

The purpose of this memorandum is to transmit the revised Nationally Significant Issues (NSI) Guidance for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) which includes: 1) the *FIFRA Nationally Significant Issues List and Level of Headquarters Involvement*; 2) the *FIFRA Nationally Significant Issues Form*; and 3) the *Revised Procedures for Determining Headquarters Involvement in FIFRA Cases*. This memorandum and its attachments supersede the previous memorandum *Transmittal of Revised FIFRA Nationally Significant Issues Guidance* (June 30, 2011). This guidance is effective immediately.

This guidance serves a critical function by helping to ensure that the Agency maintains a consistent approach to enforcing FIFRA's statutory and regulatory requirements. Pursuant to Steve Herman's "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases" (July 11, 1994), issues are nationally significant because they are national in terms of their impact or attention, are sensitive in nature, raise unresolved policy issues, establish an important precedent, arise in an area where national consistency is of paramount importance ..., or otherwise affect the overall program." The FIFRA NSI guidance identifies a limited set of issues that meet these criteria. Ensuring a consistent position on legal issues across the Regions assures the public that the Agency is objective in addressing noncompliance in the regulated community and eliminates the inefficiencies caused when two regions take different legal positions, for example, when a Region learns late in a case that another Region took a different legal position in a prior case. Finally, a consistent approach to enforcement across the regions is an important aspect in sustaining a national enforcement program.

I want to thank the regions for providing input to the Waste and Chemical Enforcement Division (WCED) on the draft NSI guidance. We believe the reduced number of NSI issues in the revised guidance will result in a more efficient use of FIFRA enforcement resources. WCED will continue to review the list of NSIs on a regular basis to ensure it reflects emerging areas of significance and current issues of national interest in the FIFRA enforcement program.¹ The new procedures described in this

¹ For information about nationally significant issues and the Headquarters/Regional coordination process generally, see, e.g., "OCE Efforts to Improve the Efficiency of Regulatory Enforcement Cases," Susan Shinkman (March 5, 2013); "OECA/Regional Procedures for Civil Judicial and Administrative Enforcement Case Redefinition," Robert Van Heuvelen (Nov. 9, 1994); "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases,"

guidance are not intended to preclude or discourage informal discussions of FIFRA enforcement case issues among the regions and headquarters. Regions should also contact headquarters regarding any case or issue that merits national attention or input even if the issue is not listed as an NSI in this guidance.

To facilitate ease of access, the FIFRA NSI Guidance will be placed on the WCED intranet at <http://intranet.epa.gov/oeca/oc/wced/internal-documents.html>. Please contact Brian Joffe, Chief, Pesticides and Tanks Enforcement Branch (joffe.brian@epa.gov), if you have any questions regarding this guidance or the NSI list.

Attachments

FIFRA Nationally Significant Issues List and Level of Headquarters Involvement

Nationally Significant Issue	Assistant Administrator Concurrence
1. All cases \geq \$1million proposed (bottom-line) penalty	X

Nationally Significant Issue	WCED Division Director Consultation	PTEB Chief Consultation
2. Plant incorporated Protectants		X
3. Violations involving actual serious or widespread harm to human health or the environment		X
4. Case differs from conclusions made in an Enforcement Case Review (ECR) concerning EPA's regulation of a pesticide or device		X
5. Taking a position that deviates from EPA's established policy or guidance, including the FIFRA Enforcement Response Policy (ERP).	X	
6. Case has the potential to shut down a business.	X	
7. Violations of FIFRA § 6(a)(2) where Respondent failed to disclose information regarding unreasonable adverse effects on the environment to the EPA.		X
8. Seizure action	X	
9. Case may adversely impact EPA's relationship with the States or other federal agencies.		X
10. Any case in which the Respondent has raised "fair notice" issues as a defense to liability and the region believes this is a litigation risk.		X
11. Filing of an administrative complaint where a region anticipates going to hearing.	X	
12. Filing of dispositive motions involving discussion of NSI Issues	X	
13. Determinations to appeal or not to appeal an Administrative Law Judge decision.	X	
14. Commencement of a federal enforcement action where a State has previously initiated an enforcement action under state authority for the same or similar violations.	X	

*** * * PRIVILEGED/CONFIDENTIAL/DO NOT RELEASE UNDER FOIA * * ***

FIFRA Nationally Significant Issues Form

Case Name/Dkt No.: _____

Location of Facility: City _____ State _____ Region _____

Forum: (Check one): ☐ ALJ/RJO ☐ EAB

Status of case: (Check all that apply)

☐ Pre-filing, in development
☐ Filed and stayed or pending
☐ Dispositive pleadings imminent

☐ Settlement negotiations ongoing
☐ Filed and active
☐ Trial or hearing imminent

Narrative Description of the FIFRA Violations:

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Nationally Significant Issue(s) and/or Bottom-Line Penalty \geq \$1,000,000:

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Region's recommendation for OECA involvement/assistance:

☐ AA Concurrence ☐ DD Consultation ☐ BC Consultation ☐ Opt Out

Rationale for Recommendation:

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Regional contacts:

Office of Regional Counsel contact name: _____

Phone: _____ Email: _____

Regional Program Office contact name: _____

Phone: _____ Email: _____

Signature: _____

Appropriate Regional Manager

Date Signed

Level of Headquarters Involvement

****Appropriate HQ signature required before communications with respondent commence****

☐

OECA AA Concurrence

☐

WCED DD Concurrence

☐

BC Consultation

☐

HQ Opt Out

WCED Manager

Date Signed

Appropriate Regional Manager

Date Signed

Initial Headquarters Concurrence/Consultation

☐

AA Concurrence Complete

☐

DD Consultation Complete

☐

BC Consultation Complete

Appropriate OECA Manager

Date Signed

Revised Procedures for Determining Headquarters Involvement in FIFRA Cases

This document describes the procedures that Regions should follow for cases involving Nationally Significant Issues (NSIs). Note that all requirements of this NSI Policy must be complete before the region contacts the Respondent (i.e., before sending a “Show Cause” letter or commencing pre-filing² negotiations). If the NSI issue is identified after discussions with Respondent have already commenced, the region must complete the NSI process as soon as possible before proceeding with negotiations. If any NSIs emerge after negotiations commence or in the post-filing stages, Regions will notify WCED, as soon as the Region identifies them, on the FIFRA Nationally Significant Issues Form.

Step 1: Regional Notification to Headquarters

Regions should use the FIFRA Nationally Significant Issues Form (“NSI form”) to notify OECA. All NSI forms should be submitted by email as a .pdf file to the Chief of the Pesticides and Tanks Enforcement Branch (PTEB).

For cases with projected bottom line penalties of \$1,000,000 or more.³ Before commencing any pre-filing negotiations (e.g., settlement discussions) or at least 50 days before filing a complaint or order, the Region will notify WCED if there are any NSIs in addition to the penalty amount or if there are no additional NSIs.

For cases with projected bottom line penalties under \$1,000,000. Before commencing any pre-filing negotiations (e.g., settlement discussions) or at least 50 days before filing a complaint or order, the Region will notify WCED.

Step 2: Determine Level of Headquarters Involvement

As soon as possible, but no later than 7 days after the Region notifies WCED of any cases with NSIs per Step 1, the appropriate WCED manager (either DD or BC) will determine the level of headquarters involvement taking into consideration the presumptive levels of involvement identified above and the region’s recommendation. The WCED branch chief may contact the Region to confer on the NSI and to discuss goals and expectations for the enforcement action and the NSI process.⁴ Once the region and HQ agree on the level of involvement, the appropriate managers will sign the “Level of Headquarters Involvement” section of the NSI form.

Step 3: NSI Consultation and/or Concurrence Process

Within 7 business days of determining the level of Headquarters involvement, the PTEB chief will arrange for the region to conduct an initial consultation with a PTEB attorney and/or case officer unless headquarters or the region requests additional time. The goal of NSI consultation is to ensure that NSI issues have a strong legal basis, that any potential legal defenses or unresolved technical issues are identified and addressed, and that the proposed bottom line penalty is consistent with the FIFRA Enforcement Response Policy. Working together with the regional case team, the OCE attorney and/or case officer will prepare briefing materials for the PTEB Chief, WCED DD or OECA AA, depending on the level of headquarters involvement. PTEB and the region will determine who will lead briefings for the OECA AA, WCED DD or PTEB Chief and determine what, if any, information is required to evaluate the matter. After this consultation and/or concurrence, the appropriate OECA manager will

² “Pre-filing” means prior to filing a civil administrative complaint.

³ See Memorandum from Susan Shinkman, Director of the Office of Civil Enforcement (OCE) to OCE Division Directors et al., *Opting Out of Regional Settlements That Involve a Bottom-line Penalty of \$1,000,000 or Above* (March 5, 2013).

⁴ See Memorandum from Susan Shinkman, Director, Office of Civil Enforcement, to OCE Division Directors et al., *OCE Efforts to Improve Efficiency of Regulatory Enforcement Cases* (Mar. 5, 2013).

sign the NSI form to indicate that consultation and/or AA-level concurrence is complete. The region may continue to consult with headquarters; however, further concurrence or consultation is not required absent a significant change in a case.⁵

OECA Opt-Out:

OECA may opt out of participating in a case even if there are NSIs. OECA's decision to opt out of the NSI is achieved through signature by the DD on the NSI form. Following the opt-out, the consultation process resumes only if a region identifies another NSI.

⁵ "Significant change in a case" includes any change from the agreed upon approach during the consultation or concurrence, including if a region believes the NSI issue no longer exists or if the region believes the bottom line will drop below \$1 million dollars after previously receiving concurrence from the OECA AA.

